LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
AUG 11 1958
Clerk

No. 193

In the Supreme Court of the United States

October Term, 1958

WILLIAM M. LANGLEY, Petitioner,

v.

STATE OF OREGON, Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

---

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT Y. THORNTON
Attorney General of Oregon
Counsel for Respondent
Supreme Court Building
Salem, Oregon

August 8, 1958

INDEX

	Page
Statement of the Case	1
Argument	
I. The decision below is correct	6
II. There is no substantial federal question	11
Conclusion	15
Appendix A—Indictment	16
Appendix B—Instructions of the Court	18
Appendix C—Supplemental Motion for a New Trial	20
Affidavit of Richard R. Carney	22
Affidavit of K. C. Tanner	24
Appendix D—Counter Affidavit	27
Appendix E—Order (denying supplemental motion)	29

CITATIONS

Cases:	Page
American Railway Express Co. v. Kentucky, 273 U.S. 269 (1926)	15
Barrington v. Missouri, 205 U.S. 483 (1907)	12
Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1930)	13
Dixson v. Duffy, 344 U.S. 143 (1952)	13
Gibson v. Mississippi, 162 U.S. 565 (1896)	15
Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931)	14
Holt v. United States, 210 U.S. 245 (1910)	12
Iowa Central Railway Co. v. Iowa, 160 U.S. 389 (1896)	14

CITATIONS—Continued

	Page
Maxwell v. Dow, 176 U.S. 581 (1900)	14
Newbern v. Exley Produce Express, 308 Or. 622, 303 P. (2d) 231 (1956)	7
Patterson v. Colorado, 205 U.S. 454 (1907)	13
People v. Stroble, 36 Cal. (2d) 615, 226 P. (2d) 330 (1951)	7
Semler v. Cook-Waite Laboratories, Inc., 203 Or. 139, 278 P. (2d) 150 (1954)	8, 13
State v. Hauptmann, 115 N.J.L. 412, 180 A. 809, cert. den. 296 U.S. 649, 56 S.Ct. 310, 80 L.Ed. 461 (1935)	7
State v. Imlah, 204 Or. 43, 281 P. (2d) 973 (1955)	14
State v. Kline, 50 Or. 426, 93 P. 237 (1907)	8, 13
Statutes:	
ORS 8.670	8, 11, 14
ORS 17.610	7
ORS 136.850	7
ORS 167.505	1, 8, 14
ORS 167.515	1, 10,14
Miscellaneous:	
39 Am. Jur., Notice and Notices, § 12, p. 238	10
65 C.J.S., Negligence, § 5c, p. 352	10
66 C.J.S., New Trial, § 201, p. 484	7
66 C.J.S., Notice, § 11a, p. 642	10
88 C.J.S., Trial, § 52, p. 139	7

STATEMENT OF THE CASE

Under section 167.505 of the Oregon Revised Statutes [hereinafter abbreviated to ORS] certain forms of gambling are prohibited and proscribed. ORS 167.515 provides that:

> "Any district attorney * * * who refuses or wilfully neglects to inform against and diligently prosecute all persons who * * * [he has] *reasonable cause to believe* are guilty of a violation of ORS 167.505 * * * shall be punished upon conviction by a fine of not less than $50 nor more than $500, and the court shall declare the office or appointment held by such officer vacant for the balance of his term." (Emphasis supplied)

Under this statute an indictment [R. 3; App. 16-17]* was returned charging that petitioner as District Attorney of Multnomah County (Portland, Oregon) "having knowledge and reasonable cause to believe that one William B. Nettleton" was violating ORS 167.505, did "wilfully and unlawfully refuse and neglect to inform against and prosecute the said William B. Nettleton." Petitioner was convicted, fined $100 and the office of District Attorney declared vacant [R. 7; App. A of petition, 12-13].

At the trial petitioner, himself a former Assistant United States Attorney and member of the Oregon Bar since 1938 [Transcript of Testimony 349-350], was represented by two attorneys.

---

* In this brief "R" means the certified transcript of record filed by petitioner; "Sup. R" means the additional portions of the record certified by the Clerk of the Oregon Supreme Court and filed by respondent; "App." means appendix; and "Petition" means petition for certiorari; "Transcript of Testimony" is the transcript of the trial proceedings filed by petitioner in this Court as part of the certified transcript of record.

At a recess of the proceedings during which the trial jury was being selected, petitioner, out of the presence of the jury and in the trial judge's chambers, was arrested for perjury [Supp. R. 23, 24; App. 23, 27-28].

During the course of the trial photographers were present in the courtroom and within the bar of the court and took pictures of the proceedings. Petitioner objected on several occasions but was overruled [R. 11-14].

At the trial evidence was introduced from which the jury could have found that petitioner (1) conspired to permit illegal gambling in Multnomah County [Transcript of Testimony 168-172; R. 44-45; App. B of Petition, 20-22]; (2) was present and observed the illegal gambling on the occasion for which petitioner was convicted of failing to prosecute [Transcript of Testimony 32-38, 105-106, 123-125, 134-135, 262-264; R. 46; App. B of Petition, 22-23]; and (3) received a share of the profits resulting from the gambling operation on that occasion [Transcript of Testimony 184; R. 45; App. B of Petition, 21-22]. There was no evidence at the trial, however, that petitioner actually knew the identity of the person conducting the illegal gambling to be William B. Nettleton.

After both sides had rested, petitioner moved for a directed verdict of acquittal [Transcript of Testimony 467-470; R. 34-35], contending that there was no evidence that he actually knew that William B. Nettleton had conducted the illegal gambling in question.

This motion was denied [Transcript of Testimony 470; R. 35].

On the question of knowledge the trial court instructed the jury in part that the district attorney was

> "* * * not required to assume the functions of a detective or policeman and undertake personally to ferret out facts connected with the crime or the names of witnesses to the crime *unless the District Attorney has personal knowledge or within the reasonable — or reasonably could have personal knowledge of the matter himself.* It is the law, of course, that a District Attorney is not a policeman or a detective or goes running around looking for things. But the only modification that is possible to that would be that *if the District Attorney knew or should have known of something of that kind going on, then it would be his — in his use of the disclosure, honestly arrived at, to act.*" (Emphasis supplied) [Transcript of Testimony 483-484; App. 18]

After the verdict of guilty petitioner filed a supplemental motion for a new trial [Supp. R. 13; App. 20] in which K. C. Tanner, one of petitioner's counsel, by affidavit [Supp. R. 24, App. 24] alleged that he (1) was interrupted during his opening statement to the jury by the clicking noise of a moving picture camera, (2) was interrupted during the examination of a witness by the clicking noise of moving picture cameras, (3) had moved the court for enforcement of the rule of court requiring all persons not privileged by the rule to be excluded from behind the rail of the courtroom, which motion was denied, and (4) during his final argument of the case

to the jury he was required to face the camera of a photographer who took pictures.

Petitioner also filed, after the verdict of the jury, a motion in arrest of judgment, and in the alternative to set aside the verdict and grant the defendant a new trial [Supp. R. 1-12].

In none of the above said motions was the factual allegation made that petitioner's two counsel were not able to make proper legal objections when the occasion demanded because of the presence of photographers in the courtroom.

The aforesaid motion to set aside the verdict and grant a new trial and supplemental motion for a new trial were denied [Supp. R. 28; App. 29].

On appeal petitioner asserted as error the trial court's failure to grant a directed verdict of acquittal [R. 41; App. B of Petition, 171]. On this point the Oregon Supreme Court held that the motion for a directed verdict was properly denied because a "slight investigation" by petitioner would have disclosed to petitioner the identity of Nettleton as the gambling law violator or that the jury could have so found [R. 50; App. B of Petition, 27]. The Court in so holding also held [R. 49-50; App. B of Petition, 27]:

> "We are dealing with a charge of neglect of duty against a public official whose duty it is to enforce the law. Included therein is the duty of investigation. We hold as a matter of law that, *where it is established*

that the district attorney has actual knowledge of violation of the gambling laws on a particular occasion and that an investigation such as it is his duty to make would have discovered the identity of the violators, such persons are, within the meaning of the statute, persons whom the district attorney has reasonable cause to believe to be violators and whom he cannot refuse and willfully neglect to prosecute without incurring the penalty of forfeiture of his office." (Emphasis supplied)

With reference to the issue of photography (also assigned as error) the Supreme Court of Oregon held as follows [R. 76; App. B of Petition, 57-58]:

"Much, however, as we deplore the decision of any trial judge not to be governed by Canon 34, and, in this case, the ignoring in favor of photographers the rule of court concerning the persons who are permitted within the bar of the courtroom during the trial, *the question here cannot be determined as one either of constitutional law or of policy; but the controlling consideration is whether the record discloses that the taking of photographs during the trial of this case influenced the verdict of the jury.* Though the ruling was error, it was not necessarily reversible error. Canon 34 does not declare that its observance is essential to a fair trial, and it is obvious that the court cannot make such a pronouncement. *The circuit judge, by denying a motion for a new trial, manifested his opinion that no prejudice had resulted to the defendant.* While we do not share the judge's views respecting the propriety of courtroom photography, we accord weight to his judgment upon the question before us. This is but to follow the established practice of appellate courts in like cases. *Hays v. Herman*, supra; 88 CJS 139, Trial § 52; 53 Am Jur 55, Trial § 42; 46 ALR 2d 952. *A careful examination of the entire record fails to discover anything that would enable this court to say that the circuit*

court abused its discretion in denying the motion for a new trial." (Emphasis supplied)

Thereafter, petitioner applied for a rehearing asserting, among other matters, the questions herein raised [R. 79-90].

The petition for rehearing was denied [R. 91].

ARGUMENT

I

The decision below is correct.

Petitioner asserts that the Oregon Supreme Court was in error when it held that "excessive courtroom photography disturbing the trial and effecting [sic] the mental processes of counsel for petitioner was not a denial of a fair trial." [Petition 7]

The Oregon Supreme Court did not so hold. The Court actually held that the trial court had not abused its discretion in denying [Supp. R. 28; App. 29] appellant's supplemental motion for a new trial [Supp. R. 13-14, 22-25; App. 20] which motion was based in part on the presence of photographers in the courtroom [R. 76; App. B of Petition, 58]:

> "* * * A *careful examination of the entire record fails to disclose anything* that would enable this court to say that the circuit court abused its discretion in denying the motion for a new trial." (Emphasis supplied)

In so holding the Supreme Court was simply following established precedent: Newbern v. Exley Produce Express, (1956) 208 Or. 622, 632, 303 P. (2d) 231; ORS 136.850, 17.610; 66 C.J.S., New Trial, § 201, p. 484; 88 C.J.S., Trial, § 52, p. 139; State v. Hauptmann, (1935) 115 N.J.L. 412, 180 A. 809, cert. den. (1935) 296 U.S. 649, 56 S.Ct. 310, 80 L.Ed. 461; People v. Stroble, (1951) 36 Cal. (2d) 615, 226 P. (2d) 330.

Petitioner also urges [Petition 7] that the "photography effected [sic] defense counsel's mental processes so that he did not properly raise legal objections in the trial court and the Oregon Supreme Court refused to consider these legal points because they were not raised in the trial court."

An examination of the motion for new trial [Supp. R. 1-9] and supplemental motion for new trial [Supp. R. 13-14, 22-25; App. 20] and relevant portions of the transcript of testimony [Transcript of Testimony 14-15, 20-21, 185-190] and Bill of Exceptions [R. 11-14] does not disclose that any contention was ever presented to the trial court urging that counsel for petitioner were not able to make proper legal objections when the occasion demanded same because of the presence of photographers in the courtroom.

For this reason is was clearly correct for the Oregon Supreme Court to refuse to consider any legal point not preserved by appropriate objection in the trial court:

Semler v. Cook-Waite Laboratories, Inc., (1954) 203 Or. 139, 148, 278 P. (2d) 150; State v. Kline, (1907) 50 Or. 426, 433, 93 P. 237.

As a factual matter the court adjudicated on the merits most of petitioner's points notwithstanding the failure to object below [R. 61-62, 65-66, 76; App. B of Petition 39-40, 43-44, 57-58]. Further, it stretches credulity through the breaking point to believe that three experienced lawyers—petitioner and his two counsel—could not object when the occasion demanded. The entire transcript of testimony discloses otherwise.

Petitioner next urges [Petition 10] that the Oregon Supreme Court added a charge under a statute (ORS 8.670) not contained in the indictment and as to which petitioner was not tried.

The indictment [R. 3] against petitioner charged that petitioner as District Attorney of Multnomah County "having knowledge and *reasonable cause to believe* that one William B. Nettleton" was violating the Oregon anti-gambling statute "did then and there wilfully and unlawfully refuse and neglect to inform against and prosecute the said William B. Nettleton for violating section 167.-505, Oregon Revised Statutes." Under this indictment the Supreme Court held that the State was obliged to prove that petitioner had "reasonable cause to believe" that William B. Nettleton violated ORS 167.505 [R. 46-47; App. B. of Petition, 23].

The State produced ample evidence from which the jury could have found that petitioner actually observed illegal gambling on the occasion for which petitioner was convicted of failing to prosecute William B. Nettleton [Transcript of Testimony 32-38, 105-106, 123-125, 134-135, 262-264; R. 46; App. B of Petition, 22-23]. There was no evidence, however, that petitioner actually knew the identity of the person conducting that gambling to be William B. Nettleton.

With regard to the question of petitioner's knowledge that William B. Nettleton was the person violating the gambling law the trial court instructed the jury that the district attorney did not have to assume the function of a detective and undertake personally to ferret out the facts connected with the crime or the names of witnesses to the crime [Transcript of Testimony 483-484; App. 18]. This instruction, however, was qualified by:

> "* * * unless the District Attorney *has personal knowledge* or within the reasonable — *or reasonably could have personal knowledge* of the matter himself * * *." (Emphasis supplied) [Transcript of Testimony 484; App. 18]

and by

> "* * * if the District Attorney knew or *should have known* of something [gambling] of that kind going on, * * *." (Emphasis supplied) [Transcript of Testimony 484; App. 18]

The court also instructed that petitioner

> "* * * must have known *or had reasonable cause to have known*, that William B. Nettleton was guilty of the gambling statute of Oregon." (Emphasis supplied) [Transcript of Testimony 485; App. 19]

These instructions properly applied the phrase "reasonable cause to believe" contained in both ORS 167.515 and in the indictment [R. 3; App. 16-17] with regard to the question of petitioner's knowledge that William B. Nettleton was the person violating the gambling law. The Oregon Supreme Court so held [R. 49-50; App. B of Petition, 27]:

> "* * * *where it is established that the district attorney has actual knowledge of violation of the gambling laws on a particular occasion* and that an investigation such as it is his duty to make would have discovered the identity of the violators, such persons are, within the meaning of the statute, persons whom the district attorney has reasonable cause to believe to be violators and whom he cannot refuse and willfully neglect to prosecute without incurring the penalty of forfeiture of his office." (Emphasis supplied)

In short, Oregon merely applied to petitioner a standard of constructive knowledge, supported by ORS 167.515, the indictment [R. 3; App. 16-17] the lower court's instructions [Transcript of Testimony 483-485; App. 18-19] and long-established law: 65 C.J.S., Negligence, § 5c, p. 352; 66 C.J.S., Notice, § 11a, p. 642; 39 Am. Jur., Notice and Notices, § 12, p. 238. That standard was appropriately applied to

petitioner in view of the fact there was ample evidence from *which the jury could have found that petitioner actually observed illegal gambling on the occasion in question* [Transcript of Testimony 32-38, 105-106, 123-125, 134-135, 262-264; R. 46; App. B of Petition, 22-23] *and received a portion of the profits therefrom* [Transcript of Testimony 184; R. 45; App. B of Petition, 21-22]*

The fact that the Supreme Court also found support for its holding in a general statute (ORS 8.670)** defining in general the duties of a district attorney did not change the theory of the prosecution which was for failing to prosecute a gambling violator who petitioner had reasonable cause to believe was violating the gambling law [R. 3; App. 16-17].

II

There is no substantial federal question.

Petitioner's first three questions all raise the issue of prejudice allegedly resulting to petitioner from the presence of photographers in the courtroom during the trial.

---

* Petitioner, at page 10 of his petition, asserts that "an investigation was made by petitioner, the sheriff, and the Oregon State Police and common gambling was not discovered." The only support in the record for this assertion, however, is petitioner's own petition for rehearing in the Oregon Supreme Court [R. 79, 85].

** It is the law of Oregon that the laws thereof are judicially noticed: ORS 41.410 (2). It is therefore not required that an indictment set forth a general statute such as ORS 8.670 which defines in general the duties of a district attorney: ORS 132.570. An indictment is sufficient if it is in the language of the statute defining the crime (here ORS 167.515): State v. German, (1939) 162 Or. 166, 174, 90 P. (2d) 185; ORS 132.520.

This factual issue, however, was foreclosed when the trial court denied [Supp. R. 28] petitioner's supplemental motion for a new trial [Supp. R. 13-14, 22-25; App. 20]. The Oregon Supreme Court, after examining the record held that it could not find that such denial constituted an abuse of the trial court's discretion [R. 76; App. B of Petition, 58].

The Oregon Supreme Court's refusal to reverse the denial of the motion for a new trial under these circumstances does not present a federal question: Barrington v. Missouri, (1907) 205 U.S. 483, 485, where the court stated as follows:

> "* * * The state Supreme Court held it to be a well-settled rule of law in Missouri that the granting of a change of venue in a criminal case rested largely in the discretion of the trial court, and that 'where the trial court has heard the evidence in favor of and against the application, and a conclusion reached adversely to granting the change, such ruling will not be disturbed by thi court, and should not be unless there are circumstances of such a nature as indicates an abuse of the discretion lodged in such court.' And the Supreme Court, after a full review of all the testimony, decided that the trial court had acted properly in overruling the application for a change of venue. In our judgment no Federal question was involved. Were this otherwise it would follow that we could decide in any case that the trial court had abused its discretion under the laws of the State of Missouri, although the Supreme Court of that State had held to the contrary."

Cf. Holt v. United States, (1910) 218 U.S. 245, 251.

In addition, the second question presented by petitioner is not properly before this Court. The factual contention that petitioner's two counsel were unable to make proper legal objections because of the presence of photographers was never presented to the trial court during the trial proceedings [R. 11-14] or in either the motion for new trial [Supp. R. 1-9] or supplement motion for new trial [Supp. R. 13-14; 22-25; App. 20]. It was thus too late to present that contention to the Oregon Supreme Court: Semler v. Cook-Waite Laboratories, Inc., (1954) 203 Or. 139, 148, 278 P. (2d) 150; State v. Kline, (1907) 50 Or. 426, 433, 93 P. 237. Hence, the refusal of the Oregon Supreme Court to consider any legal point of petitioner not properly preserved by objection in the trial court clearly rests on adequate state grounds precluding review on certiorari by this Court: Dixon v. Duffy, (1952) 344 U.S. 143, 146.

Petitioner's third question contends in part that the Oregon Supreme Court overlooked controlling precedent. Such contention does not present a federal question: Brinkerhoff-Faris Trust and Savings Co. v. Hill, (1930) 281 U.S. 673, 680; Patterson v. Colorado, (1907) 205 U.S. 454, 461.

Petitioner's third question also contends that petitioner was denied due process because of the failure of the State to provide a procedure whereby petitioner could have impeached through the testimony of a juror the verdict of the

jury. Such contention does not present a federal question. Accord: Iowa Central Railway Co. v. Iowa, (1896) 160 U.S. 389, 394; Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., (1931) 284 U.S. 151, 158; Maxwell v. Dow, (1900) 176 U.S. 581, 602-605. Further, Oregon law does not bear out petitioner's contention. The Oregon Supreme Court has intimated that juror may be permitted to im-
Court has intimated that a juror may be permitted to im-
portance" and where enforcement of the rule against impeachment "would violate 'the plainest principles of justice'": State v. Imlah, (1955) 204 Or. 43, 54-55, 281 P. 2d 973.

Petitioner's fourth question presented for review, in which petitioner contends he was convicted in the appellate court on a charge under a statute (ORS 8.670) not alleged in the indictment [R. 3] and not an issue in the trial clearly does not present a substantial federal question. As pointed out above, [Resp. Br. 8-11]; ORS 167.515 punishes district attorneys for failing to prosecute gambling law violators who they have "reasonable cause to believe" are violating the gambling laws. The indictment [R. 3] charged petitioner with failing to prosecute William B. Nettleton who petitioner had "reasonable cause to believe" was the person violating ORS 167.505. The indictment thus used the words of ORS 167.515. The trial court in its instructions to the jury [Transcript of Testimony 483-485; App. 18-19] in effect defined the phrase "reasonable

cause to believe" to include constructive knowledge. The Oregon Supreme Court did likewise, charging petitioner with knowledge of the identity of William B. Nettleton as the person conducting the illegal gambling [R. 49-50; App. B. of Petition, 27].

This holding was proper. A district attorney who actually observes illegal gambling and shares in the illegal profits therefrom (both of which facts the jury could have so found) cannot refuse to investigate and be heard to defend "I didn't have 'reasonable cause to believe' that William B. Nettleton conducted and operated this gambling."

In short, the fourth question involves matters of local law only: American Railway Express Co. v. Kentucky (1926) 273 U.S. 269, 273-274; Gibson v. Mississippi, (1896) 162 U.S. 565, 591.

CONCLUSION

For the reasons advanced the respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT Y. THORNTON
Attorney General of Oregon.

Attorney for Respondent

APPENDIX A

[Record 3]

SECRET

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

THE STATE OF OREGON, Plaintiff,	No. C34911
vs.	INDICTMENT
WILLIAM M. LANGLEY, Defendant.	For violation of Section 167.515, O.R.S.

William M. Langley is accused by the Grand Jury of Multnomah County and State of Oregon by this indictment of the crime of wilfully refusing and neglecting as a District Attorney to inform against and diligently prosecute persons guilty of a violation of Section 167.505, Oregon Revised Statutes, committed as follows:

The said William M. Langley being at all times herein mentioned the duly elected, qualified and acting District Attorney of Multnomah County, State of Oregon, on the 18th day of March, 1955, and continuously at all times thereafter, in the County of Multnomah and State of Oregon, then and there being, and the said William M. Langley then and there having knowledge and reasonable cause to believe that one, William B. Nettleton, on the 18th day of March, 1955, in the County of Multnomah and State of Oregon, then and there being, was then and there wilfully and unlawfully dealing, playing, carrying on and conduc-

ting as owner, proprietor and employee, games of twenty one and other games played with cards and dice, a more particular description of which other games so played with cards and dice being to the Grand Jury unknown, all of which said games were then and there played for money, checks, credits and other representatives of value contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon, all of which he, the said William M. Langley, then and there well knew, and the said William M. Langley, as said District Attorney, did then and there wilfully and unlawfully refuse and neglect to inform against and prosecute the said William B. Nettleton for violating Section 167.505, Oregon Revised Statutes, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the County aforesaid, this 14th day of February, 1957.

/s/ Robert Y. Thornton
Attorney General

By /s/ Elliott B. Cummins
Special Assistant-Attorney General

By /s/ Ralph W. G. Wyckoff
Special Assistant-Attorney General

Witnesses examined before
the Grand Jury:

William B. Nettleton
James B. Elkins.

APPENDIX B

Instructions Of The Court

[Page 483-485, Transcript of Testimony]

I instruct you that the District Attorney of the State of Oregon is a public prosecutor, and it is generally the District Attorney's duty to institute prosecutions where information has been brought to him that offenses have been committed. But I instruct you that the District Attorney is not required to assume the functions of a detective or policeman and undertake personally to ferret out facts connected with the crime or the names of witnesses to the crime unless the District Attorney has personal knowledge or within the reasonable — or reasonably could have personal knowledge of the matter himself. It is the law, of course, that a District Attorney is not a policeman or a detective or goes running around looking for things. But the only modification that is possible to that would be that if the District Attorney knew or should have known of something of that kind going on, then it would be his — in his use of the disclosure, honestly arrived at, to act.

You are instructed that there is no evidence in this case of any complaint having been made to the defendant concerning the violation of the gambling statute by Mr. Nettleton and you are instructed that if any — that the evidence, if any, that the defendant had knowledge of the violation of the gambling statute by William B. Nettleton

was evidence that the defendant knew of such violation from his own personal observation, I instruct you that the mere personal knowledge or information of the District Attorney of a violation of the gambling statute is not sufficient in and of itself to base a conviction of the defendant in this case, if the District Attorney is acting with honest discretion and with a full knowledge of what the conditions are and the circumstances surrounding the particular incident.

I instruct you that in order to find the defendant guilty, you must find that the defendant wilfully neglected and refused to prosecute William B. Nettleton. In this regard I further instruct you that the defendant must have known, or had reasonable cause to have known, that William B. Nettleton was guilty of the violation of the gambling statute of Oregon.

You are further instructed that evidence that the defendant had reasonable cause to believe that someone other than Mr. Nettleton at Jack and Jill's was guilty of this violation is insufficient. If you find that the defendant did not know or have reasonable cause to believe that William B. Nettleton was the person who was guilty of violation of the gambling statute, you should acquit the defendant.

APPENDIX C

[Supp. R. 13-14, 22-25]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

THE STATE OF OREGON,
Plaintiff,
vs.
WILLIAM M. LANGLEY,
Defendant.

No. C-34911

SUPPLEMENTAL MOTION FOR A NEW TRIAL

Comes now the defendant, William M. Langley, and within the time provided by law, files this, his Supplemental Motion for a New Trial, and respectfully moves the court to set aside the verdict rendered by the jury and to grant a new trial upon the following grounds and for reasons as follows:

1. Ireegularity [sic] in the proceedings of the court, jury and adverse party, orders of the court and abuse of discretion, by which the defendant was prevented from having a fair trial.

2. Misconduct of the jury and the prevailing party.

3. Accident and surprise which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial.

5. Insufficiency of the evidence to justify the verdict,

and that it is against law, for the following reasons, and those appearing in the original motion:

That the defendant was charged by the indictment with the crime of nonfeasance in wilfully refusing and neglecting as District Attorney to prosecute William Be Nettleton for the crime described in the indictment and committed by Nettleton in Multnomah County, Oregon, on the 18th day of March, 1955; that there was no evidence to support the charge contained in the indictment, and the evidence produced at the trial did not correspond with the allegations of the indictment, and was not confined to the single charge set forth in the indictment.

6. Error in law occurring at the trial and excepted to by the defendant:

This motion is made pursuant to ORS 136.850 and 17.610, and is based upon the files and records herein, and upon the affidavits of Fred E. Alsop, K. C. Tanner and Richard R. Carney, which are attached hereto and made a part hereof.

/s/ Tanner & Carney

/s/ Tolbert McCarroll
Attorneys for Defendant
509 Broadway Bldg.,
Portland 5, Oregon CA 6-2835

Due Service of the within Supplemental Motion for New Trial and the affidavits attached thereto by receipt

of a true copy thereof is hereby accepted within Multnomah County, Oregon, April 22, 1957.

ROBERT Y. THORNTON, ATTORNEY GENERAL

By /s/ Francis T. Wade.

[Affidavit of Fred E. Alsop has been omitted because it is not pertinent to the questions in this appeal.]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

THE STATE OF OREGON, Plaintiff, vs. WILLIAM M. LANGLEY, Defendant. | No. C-34911 | AFFIDAVIT

STATE OF OREGON
County of Multnomah } ss.

I, RICHARD R. CARNEY, being first duly sworn on oath, depose and say:

That I am one of the attorneys for William M. Langley, the defendant in the above entitled cause. That I make this affidavit on Mr. Langley's behalf and in support of his motion for a new trial, and for the purpose of supplementing the affidavit of K. C. Tanner dated April 14, 1957 concerning the arrest of the defendant during the course of the trial and the publicity which was given of said arrest before the jury was sealed, and in that behalf say: that the two indictments upon which the defendant,

Mr. Langley, was arrested during the course of the first day of his trial were the only two indictments returned to the Court on April 9, 1957; that the grand jury which returned said indictments was working under the direction of the Attorney General of the State of Oregon and his assistants; that said grand jury had been in session since approximately March 4, 1957, and as of this date, April 22, 1957, said grand jury is still in session; that the grand jury returned indictments against the defendant, William M. Langley, and other on March 29, 1957, and said grand jury continued in session until after the close of the defendants trial and on April 19, 1957 returned twenty-one indictments against various persons. That I verily believe that it was the sole purpose of the grand jury and the Attorney General in returning the indictments on April 9, 1957 against Mr. Langley to cause his arrest to be made during the first day of his trial in order to promote adverse publicity against him, particularly with respect to an indictment for perjury.

That not only did the arrest of the defendant, William M. Langley, during the first day of his trial create headlines in the newspapers, which newspapers were available to the trial jurors, but also the actual arrest of Mr. Langley in the chambers of Judge Lonergan were photographed by moving picture and television cameramen and the scene was made a part of at least three television new programs on the evening of April 9, 1957 and all of said programs

could have been seen, and probably were viewed, by the jurors impaneled to try the defendant, William M. Langley, in the above entitled cause.

/s/ Richard R. Carney

Subscribed and sworn to before me this 22nd day of April, 1957.

Tolbert McCarroll
Notary Public for Oregon

[SEAL]

My Commission Expires 2/27/60

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

THE STATE OF OREGON, Plaintiff, vs. WILLIAM M. LANGLEY, Defendant. | No. C-34911 | AFFIDAVIT

STATE OF OREGON
County of Multnomah } ss.

I, K. C. TANNER, being first duly sworn on oath, depose and say:

That I am one of the attorneys for William M. Langley, the defendant in the above entitled cause. That I make this affidavit on Mr. Langley's behalf and in support of his motion for a new trial, and in that behalf say: That when the trial opened there were numerous reporters and

photographers in attendance upon the trial and were seated and standing in various places within the rail of the court room. That during my opening statements I was interrupted by the clicking noise of a camera, which I verily believe to be a moving picture camera, and protested such occurrence to the Court. That thereafter and during the course of the trial I was interrupted during the examination of a witness by the clicking noise of cameras, which I believe to be moving picture cameras. That I moved the Court for the enforcement of Rule 69 of the rules of this court and request that all persons not privileged by the rule be excluded from behind the rail; That said rule provides as follows:

> "Rule 69. During the trial of any case or the presentation of any matter to the Court, no person shall be permitted within the bar of the court room proper other than attorneys, court attaches, litigants, and witnesses called to the stand. This excludes members of the family of litigants."

That my motion was denied and I thereupon invoked the protection of the Constitution of the United States and claimed and asserted that the defendant, William M. Langley, was being denied a fair trial in accordance with the laws and constitution of the State of Oregon and of the United States.

That thereafter and while I was arguing the cause to the jury, I was facing one Eddie Lee, a photographer for the Oregon Journal and for Life Magazine. That the said

Eddie Lee during the hour and fifteen minutes in which I was addressing the jury, stood on the left end of the jury panel in substantially the same position with respect to the other jurors as that occupied by the alternate juror who was sitting on the right end of the jury panel. That during the entire time of my argument, I was required to face the camera of Eddie Lee who took, so I am informed by him, more than twenty-five pictures of me during said argument. That the presence of said photographer was disconcerting, that my mental processes were impaired, and that I would have appealed to the Court for protection against said photographer had it not been for the ruling which the Court had previously made with respect to permitting persons other than those allowed by Rule 69 to remain within the rail of the court room.

/s/ K. C. Tanner

Subscribed and sworn to before me this 22nd day of April, 1957.

/s/ Tolbert McCarroll
Notary Public for Oregon

[SEAL]

My Commission Expires: 2/27/60

APPENDIX D

[Supp. R. 26-27]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

THE STATE OF OREGON,
Plaintiff,
vs.
WILLIAM M. LANGLEY,
Defendant.

No. C-34911

COUNTER AFFIDAVIT

STATE OF OREGON,
County of Multnomah } ss.

I, Elliott B. Cummins, being first duly sworn on oath depose and say as follows:

That in the forenoon of Tuesday, April 9th, 1957, the Grand Jury for Multnomah County, State of Oregon, returned to the Presiding Judge of the above entitled Court two certain indictments charging the defendant with perjury and maliciously obtaining a search warrant, that said indictments were not returned by said Grand Jury for the purpose or with the intent of causing publicity or to prejudice the defendant in the trial of the above entitled cause;

That the warrants of arrest on said indictments were served on the defendant during a recess in the trial of the above entitled cause in the chambers of the Hon. Frank J. Lonergan and the bail of the defendant on each of said indictments was approved by the Hon. Frank J. Lonergan in his chambers and that none of the procedures involved in

the serving of said warrants and approval of said bail were in any way brought to the attention of the jurors who were at that time in the jury-box being examined on their qualifications to act as jurors, nor to the attention of any other jurors in attendance upon the Court; and that said incident which is referred to in the affidavit of K. C. Tanner, on file therein could not and did not in any way prejudice the defendant in the trial of the above entitled cause.

/s/ Elliott B. Cummins
Special Assistant Attorney General

Subscribed and sworn to before me on this 16th day of April, 1957.

/s/ William R. Elliott
Notary Public for Oregon

[SEAL]

My Commission Expires: 1/1/61

THE STATE OF OREGON)
County of Multnomah) ss.

I, Elliott B. Cummins, being one of the Attorneys for the State of Oregon in the above entitled Court and cause, do hereby certify that on this 16th day of April, 1957, I served the within and foregoing Counter Affidavit upon K. C. Tanner, one of the Attorneys for the defendant herein, by enclosing a copy of said Counter Affidavit duly certified to be a true copy by the undersigned, in a sealed envelope addressed to the said K. C. Tanner at his office in

the Broadway Building, Portland, Oregon, with postage fully prepaid thereon and by depositing said envelope containing said copy of said Counter Affidavit in the U. S. Post Office in Portland, Oregon, on said 16th day of April, 1957.

Dated this 16th day of April, 1957.

/s/ Elliott B. Cummins
Special Assistant Attorney General

APPENDIX E

[Supp. R. 28]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

THE STATE OF OREGON,
Plaintiff,
vs.
WILLIAM M. LANGLEY,
Defendant.

No. C-34911

ORDER

This matter having come on regularly for hearing upon defendant's, William M. Langley, motion and supplemental motion for a new trial, the State of Oregon appearing by and through Elliott Cummins and Ralph Wyckoff, Assistant Attorneys General, and the defendant appearing in person and by and through K. C. Tanner and Richard R. Carney, his attorneys and the Court having heard argument of counsel and being fully advised in the premises;

IT IS HEREBY ORDERED that defendant's motion

and supplemental motion for a new trial be and the same hereby is denied.

IT IS FURTHER ORDERED that the time for sentence of the defendant be continued until the 2nd day of May, 1957, at the hour of 10:00 o'clock A.M.

Dated this 30th day of April, 1957.

/s/ Frank J. Lonergan
JUDGE